UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATALIA KUROVSKAYA and RUSLAN DOMNICH, individually and on behalf of other persons similarly situated,

Plaintiffs,

- against -

PROJECT O.H.R. (OFFICE FOR HOMECARE REFERRAL), INC.,

Defendant.

Case No.: 1:16-cv-03030-LAK

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR REMAND

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PRELIMINARY STATEMENT

Defendant Project O.H.R. (Office for Homecare Referral), Inc., ("Project OHR" or "Defendant") submits this memorandum of law in opposition to Plaintiffs' motion to remand this action to the New York Supreme Court of the State of New York. Defendant properly removed this case from the New York Supreme Court pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d) ("CAFA"), because: (1) the amount in controversy exceeds $5,000,000, exclusive of interest and costs; (2) minimal diversity exists; and (3) the number of putative class members exceeds 100. Project OHR amply satisfied these requirements with more than "reasonable probability." Blockbuster, Inc. v. Galeno, 472 F.3d 53, 59 (2d Cir. 2006).

Plaintiffs' motion to remand disputes only the minimal diversity element, relying solely on rank speculation to do so; indeed, the named Plaintiffs do not even provide their own addresses or provide declarations to establish citizenship. Without the support of any facts or documentary evidence, Plaintiffs' motion to remand should be denied as a matter of law. Indeed, a nearly identical class action currently pending before the Eastern District of New York, against the same defendant, on behalf of the same putative class, and based on identical factual allegations, features named plaintiffs who are citizens of states other than New York. Accordingly, Project OHR can establish minimal diversity, the matter was properly removed, and the motion for remand should be denied.

Plaintiffs' attempt to invoke three statutory exceptions to CAFA similarly fails, lacking any supporting evidence. Plaintiffs cannot establish that the Local or Home State Controversy exceptions apply because they have submitted ***no evidence*** to support their assumption that two-thirds of the putative class members are citizens of New York when this action was filed. Other than rank speculation, Plaintiffs offer no basis for their theory that the class members, who last worked for Defendant on April 30, 2015, were then, at the time the complaint was filed, or still are New York citizens. Moreover, Plaintiffs do not limit the putative class to New York citizens. Even if Plaintiffs could overcome this hurdle, they could not meet the requirements of the Local Controversy exception to CAFA pursuant to 28 U.S.C. § 1332(d)(4)(A)(ii) which is not available if a class action asserting the same or similar factual allegations against the same defendant has been filed during the three year period preceding the filing of this action. Here, a class action alleging the same factual allegations to the Amended Complaint was filed against Project OHR in the Eastern District of New York, less than two months prior to Plaintiffs' filing of the Amended Complaint.

Plaintiffs' attempt to use a third exception to CAFA, the Interests of Justice exception, likewise fails due to the lack of factual support and the existence of the parallel class action filed against Project OHR in the Eastern District of New York. This attempt also fails because Plaintiffs' rank speculation is the only thing supporting Plaintiffs' theory that any, let alone one-third of the putative class members, were New York citizens at the time of filing.

Lacking factual support and the pendency of a federal class action involving the same claims and defendants, Plaintiffs cannot establish any of the exceptions to CAFA. This Court should retain jurisdiction over this matter in order to preserve judicial economy and resources, especially considering the pending class litigation before the Eastern District with an overlapping class and nearly identical factual allegations. No amount of discovery will shed light on the issue of class citizenship, given that they left Project OHR’s employment more than a year ago, or even prior to that time. For the reasons set forth above, and as further demonstrated below, removal is warranted as a matter of law.

STATEMENT OF FACTS

Plaintiff, Natalya Kurovskaya ("Kurovskaya"), individually and on behalf of a putative class of home health care workers and/or home health care attendants, commenced this action by filing a Summons and Complaint in the New York State Supreme Court, New York County, asserting various class-wide causes of action based upon Plaintiffs' employment with Project OHR. Her claims included a claim of failure to pay minimum wages and failure to pay overtime wages in violation of New York Labor Law ("NYLL"). (Complaint, annexed as Exhibit A to the Declaration of LaDonna M. Lusher).

On February 2, 2016, a class action styled as Bonn-Wittingham v. Project O.H.R. (Office for Homecare Referral), Inc., Metropolitan New York Coordinating Council on Jewish Poverty and D'Vorah Kohn, 1:16-cv-0054-ARR-JO (E.D.N.Y) (hereinafter the "Bonn-Whittingham Action"), was filed in the Eastern District of New York against Defendant Project OHR. The putative class in the Bonn-Whittingham Action is described as "all employees who worked as home attendants and/or home health aides for Defendants…at any time since October 2009…." In that action, it is alleged that Project OHR violated New York Labor Law for failing to pay minimum wages and overtime wages. (See Bonn-Whittingham Action Complaint, ¶¶ 2-3, 50, attached to the Declaration of Kevin J. O'Connor as Exhibit A). The Bonn-Wittingham Plaintiffs also allege that putative class members worked 24-hour shifts and were only paid for approximately 13 hours of their 24-hour shifts. (Id., ¶¶ 27-34). Plaintiffs named in the Bonn-Wittingham action include citizens of states other than New York. (See Bonn-Whittingham Amended Complaint, Ex. 1., attached to the Declaration of Kevin J. O'Connor as Exhibit B).

On March 28, 2016, Plaintiffs here filed an Amended Complaint adding Ruslan Domnich ("Domnich") as a named Plaintiff, and on behalf of "a class consisting of each and every person employed by Defendant to provide personal care, assistance, health-related tasks and other home care services to Defendant's clients within the State of New York during the period from January 2010 up to the present." (Amended Complaint, annexed as Exhibit B to the Declaration of LaDonna M. Lusher, ¶ 9). The Amended Complaint, for the first time, added allegations that Plaintiff Domnich, a home health care attendant, as well as the putative class members, worked 24-hour shifts, and were only paid for approximately 13 hours of their 24-hour shifts. (Amended Complaint, ¶¶ 24, 29, 34). The initial Complaint did not allege that Plaintiff Kurovskaya or the putative class members worked 24-hours shifts and were only paid for approximately 13 hours of their 24-hour shifts.

Defendant Project OHR ceased all home health care work as of May 2015 and, with few exceptions[1], does not have data regarding the domicile of its former employees after May 2015, nor has it compiled a list of their domiciles at the time they separated from employment with Project OHR, which would be a monumental task to develop. (See Declaration of Nathan Blau, ¶¶ 4, 5, attached to the Declaration of Kevin J. O'Connor as Exhibit C)

ARGUMENT

POINT I

DEFENDANT HAS ESTABLISHED JURISDICTION UNDER CAFA

Defendant has met its burden to establish jurisdiction under CAFA within a "reasonable probability." Blockbuster, Inc., 472 F.3d at 59. At the outset, Plaintiffs concede that the amount in controversy exceeds $5,000,000, exclusive of interest and costs and that the number of putative class members exceeds 100. The only CAFA requirement at issue is minimal diversity. CAFA requires only "minimal diversity" of the parties, i.e., where at least

[1] Project OHR only has information after May 2015 on less than 1% of the home attendants' who comprise the putative class. (Blau Decl., ¶ 4).

one member of a class of plaintiffs and one defendant are citizens of different states. 28 U.S.C. § 1332(d)(2)(A).

Plaintiffs' papers rather haphazardly argue that the named Plaintiffs and members of the putative class are all New York citizens, without any documentary evidence or supporting declarations whatsoever. This blanket assertion can be dismissed with just a cursory look at the addresses for the named Plaintiffs in the Bonn-Wittingham Action, which clearly demonstrate that some of the putative class members were residents of Missouri and New Jersey at the time that litigation commenced on February 2, 2016. (O'Connor Decl., Ex. B, Ex. 1). A comparison of the allegations in the Bonn-Wittingham Action to those set forth in the Amended Complaint in this action shows that the 174 Plaintiffs named in the Bonn-Wittingham Action are members of the class[2] described in the Amended Complaint ("a class consisting of each and every person employed by Defendant to provide personal care, assistance, health-related tasks and other home care services to Defendant's clients within the State of New York during the period from January 2010 up to the present"), and the named Plaintiffs in the Amended Complaint are likewise members of the class described in the Bonn-Wittingham Action ("a class…consisting of all employees who worked as home attendants and/or home health aides for Defendants…at any time since October 2009…"). (Am. Cp., ¶ 9; O'Connor Decl., Ex. A, ¶ 50). This evidence is dispositive and unequivocally sufficient to establish minimal diversity under CAFA; Plaintiffs offer no evidence of their own to defeat Project OHR's showing, as was their burden.

Moreover, even ignoring the residences of the Plaintiffs named in the Bonn-Wittingham Action, Plaintiffs' unsupported assertion that the entire putative class is comprised of New York state citizens, must fail as the putative class members ceased working for Project OHR as of May 2015. (Blau Decl., ¶ 6). Defendant lacks the information on the whereabouts of its nearly 1600 home health attendants at the time the Amended Complaint was filed, and Plaintiffs' moving papers provide no insight on the citizenship of its putative class. (Blau Decl., ¶¶ 4, 5). Accordingly, Defendant has sufficiently established that at least one member of Plaintiffs' putative class and one defendant are citizens of different states, thus establishing the minimal diversity requirement of CAFA as a matter of law.

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[2] At the appropriate juncture, if plaintiffs' counsel in the two actions will not consent to consolidation, a motion will be filed to accomplish same.

POINT II

PLAINTIFFS FAIL TO MEET THEIR BURDEN TO ESTABLISH ANY OF THE EXCEPTIONS TO CAFA JURISDICTION

A. Plaintiffs Cannot Establish That Two-Thirds Of The Putative Class Are New York Citizens To Satisfy The "Local Controversy" And "Home State Controversy" Exceptions.

Once a defendant has satisfied the jurisdictional requirements under CAFA, it is the plaintiff's burden to show that remand is proper under one of the three statutory exceptions to CAFA jurisdiction. Fields v. Sony Corp. of Am., 2014 WL 3877431, at *3 (S.D.N.Y. Aug. 4, 2014). Congress intended that CAFA jurisdiction be broadly granted and that "all of CAFA's exceptions are to be interpreted narrowly." New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust, 581 F. Supp. 2d 581, 588 (S.D.N.Y. 2008).

To establish that remand is required by the Home State or Local Controversy exceptions, Plaintiffs would have to initially demonstrate that greater than two-thirds of the putative class members were citizens of New York “as of the date of filing of the complaint or amended complaint.” 28 U.S.C. § 1332(d)(4)(A) and (B) and(d)(7). This Court has held that "rank speculation," however, is insufficient make such a demonstration. Smith v. Manhattan

Club Timeshare Ass'n, 944 F. Supp. 2d 244, 252 (S.D.N.Y. 2013); Fields, 2014 WL 3877431, at *3 (finding that plaintiffs did not meet their burden under the Home State or Local Controversy exceptions when they assumed, without offering any evidence, that more than two-thirds of a putative class of interns were domiciled in New York based on their previous college internship in New York being indicative of their desire to return to New York to start their careers). Here, speculation is all that is offered by Plaintiffs. Without declarations or documentary evidence, Plaintiffs theorize that because the putative class once worked for Defendant, a New York company, and provided services in the State of New York, it is reasonable to assume that more than two-thirds of the putative class were citizens of New York at the time of filing. (Pls' Motion Br., at 5). Setting aside the fact that Plaintiffs provide no proof to support this theory, it ignores that there are many possibilities: Plaintiffs may have lived in neighboring states while working for Defendant in the first instance, may not have been New York citizens at the time the Amended Complaint was filed or moved in the more than 12 months since the putative class has worked for Defendants. (Blau Decl., ¶¶ 4). Moreover, the putative class includes members that left Defendant's employ months or even years prior to May 2015—the whereabouts of whom could lead to even more unsupported speculation. The possibilities are endless, and just to state them demonstrates the sheer speculation on which Plaintiffs' motion is based.

Moreover, Plaintiffs have not limited the putative class to citizens of New York State. (Am. Complaint ¶ 9). Plaintiffs' speculation is no substitute for actual evidence, which this Court requires Plaintiffs to possess when establishing the citizenship requirement of the Home State or Local Controversy exceptions to CAFA jurisdiction. See Smith, 944 F. Supp. 2d at

252. Accordingly the Court should deny Plaintiffs' request to remand based on these two exceptions.

B. A Class Action Filed Less Than Two Months Prior To This Action Predicated On Identical Factual Allegations On Behalf Of The Same Class Members Against Defendant, Precludes Usage Of The Local Controversy Exception.

Not only have Plaintiffs failed to meet their burden to demonstrate that two-thirds of the putative class are New York citizens, but the Local Controversy exception cannot be established because a class action has been filed asserting the same factual allegations against Project OHR on behalf of the same putative class members within the three years preceding the filing of Plaintiffs' Amended Complaint. See 28 U.S.C. § 1332(d)(4)(A)(ii). The Bonn-Wittingham Action was filed on February 2, 2016, less than two-months prior to Plaintiffs' Amended Complaint, and alleges the same factual allegations set forth in the Amended Complaint in this action. As set forth above, the only difference between the allegations in these two actions is the length of the proposed class period. The class definitions are nearly identical, all-encompassing, and call for the same exact members to be part of both putative classes.

Declining jurisdiction will inevitably lead to duplicative processes, potentially inconsistent judgments, and undoubtedly wasted judicial resources. Exercising jurisdiction under CAFA will facilitate judicial economy, conserve party resources and promote fundamental fairness. See Hart v. Rick's NY Cabaret Intern., Inc., 967 F. Supp. 2d 955, 966-67 (S.D.N.Y. 2014). Accordingly, the Local Controversy exception fails for a second reason and Plaintiffs' request to remand based on this exception should be denied.

C. Plaintiffs Have Failed To Establish That The Court Should Remand This Matter In The "Interests of Justice".

Similarly, Plaintiffs have failed to establish the factual predicate to the Interests of Justice exception. While a District Court may decline jurisdiction, in the "interests of justice," over a class action where greater than one-third but less than two-thirds of the members of the putative class and the primary defendants are citizens of the state where the action was filed, such exception does not apply here because Plaintiffs, as set forth above, offer nothing but rank speculation as to the citizenship of any of the putative class members and offer no evidence to argue that one, let alone one-third or two-thirds of the putative class members, were citizens of New York state at the time of filing of this action. See 28 U.S.C. § 1332(d)(3).

Not only are the Plaintiffs unable to prove the first factor of the Interests of Justice exception, but several other factors weigh in favor of this Court retaining jurisdiction over this matter, each of which is sufficient by itself to preclude this exception. The Court will consider whether during the 3-year period prior to filing the action whether one or more other class actions asserting the same claims on behalf of the same persons was filed. 28 U.S.C. § 1332(d)(3)(F). The Bonn-Wittingham class action is a duplicative litigation on behalf of the same Plaintiffs against Project OHR, and it is undeniable that Plaintiffs' Amended Complaint was filed after Bonn-Wittingham and styled nearly identically. Under the clear statement of the proposed class in the Bonn-Wittingham Action, suit has already been filed in the federal court in an action which seeks to vindicate the rights of Natalya Kurovskaya and Ruslan Domnich. As set forth above, it is in the interests of justice, party resources, and judicial economy for this Court to retain jurisdiction so that this matter can eventually be consolidated with the Bonn-Wittingham Action to avoid unnecessarily duplicative and costly discovery for two identical matters.

Next, the Court will find that this matter involves "interstate interest" since Plaintiffs chose not to limit the putative class to New York citizens. See 28 U.S.C. § 1332(d)(3)(A); see also Henry v. Warner Music Group Corp., 2014 WL 1224575 (S.D.N.Y. Mar. 24, 2014).

Third, while Plaintiffs' argue that their claims arise under New York law, this Court should consider the significant overlap that this putative class will have with the Bonn-Wittingham Action, which asserts both State (NYLL) and Federal law violations (pursuant to the Fair Labor Standards Act ("FLSA")). See 28 U.S.C. § 1332(d)(3)(B); O'Connor Decl., Ex. A, ¶ 2). While New York law would apply to the claims in this action, application of Federal law will also be necessary to determine the rights of the class members since the putative class members in this matter are identical to those in the Bonn-Wittingham Action. See Fields, 2014 WL 3877431, at *5 (the Court weighing this factor in favor of the removing defendant when plaintiffs who asserted New York claims would also share similar potential claims with plaintiffs in a pending federal suit asserting both FLSA and NYLL claims).

Indeed, as was recognized in another putative class action against the same defendant before this Court, in considering the validity of the type of NYLL claims brought here, the Court will be required to analyze the FLSA exemptions and thus will necessarily look to federal law. In Severin v. Project Ohr, Inc., 2012 WL 2357410 (S.D.N.Y. 2012), the court addressed these exact circumstances, involving the same employer. There, the Court refused even the first step of conditional certification of a collective action. As for certification of a Rule 23 class, the parties disputed whether the plaintiffs had satisfied the commonality and typicality requirements for class certification in a wage case involving live-in HHAs. Id. at *4.

The defendant correctly argued that "the appropriate legal standards governing the plaintiffs' overtime and minimum wage claims under the NYLL necessitate individualized, fact-specific inquiries into the conditions of each home attendant's employment." Id. This led the court to deny class certification because "individual questions overwhelm any questions of law and fact common to the putative class, and the plaintiffs cannot show that the claims of Severin and Cotova are typical of other OHR home attendants." Id.

The plaintiffs in Severin sought to certify a class of home attendants who worked more than 40 hours per week and alleged they were not properly compensated for overtime. The court noted that an assessment of each live-in aide was required to determine their proper rate of overtime pay under New York regulations. Id. at *6. The court also found that plaintiffs failed to show the "predominance" requirement for class status because calculating the exact overtime rate of each individual plaintiff required "individualized, fact-specific questions." Id. at *7. Therefore, the court concluded that "plaintiffs' overtime claims [are] ill-suited for classwide resolution." Id.

The Severin court also concluded that plaintiffs' claims regarding whether the home attendants were properly paid minimum wage for "sleep-in" shifts could not be handled as a class action. Id. at 10. The court stated that that the inquiry as to "[w]hether or not a home attendant actually received eight hours of sleep time and five hours of continuous sleep [as required by applicable regulation and DOL opinion] is an inherently fact-specific inquiry that is likely to hinge heavily on the characteristics of particular clients to whom sleep-in home attendants were assigned." Id. The court concluded as follows:

> "Resolving the plaintiffs' minimum wage claims will require, at a minimum, establishing the truth or falsity of a plaintiff's sleep deprivation contentions, the frequency with which the issue arose for a plaintiff, whether the plaintiff reported the problem

> to OHR, and OHR's response. Answering these questions is unlikely to "generate common answers apt to drive the resolution of" class litigation, or "resolve ... issue [s] that [are] central to the validity of each one of the [class] claims in one stroke."… Because the plaintiffs have failed to show that common questions of law or fact predominate over individual ones as to their NYLL minimum wage claim, class certification of this claim must be denied as well."

Id. As can be seen from the foregoing, a class action may not be sustained under the facts alleged here. The facts alleged by Plaintiffs are almost identical to those in Severin. Plaintiffs here claim that they were HHAs and/or PCAs and were paid a "live-in" or "sleep in" rate. Furthermore, as in Severin, they allege that they were not properly paid minimum wage or overtime rates. It is clear by Plaintiffs' allegations that the myriad individual issues overwhelm any common issues.

These are the precise circumstances where the interests of justice call for this Court retaining jurisdiction, not remanding so that Plaintiffs can avoid the Court's holding in Severin.

In sum, removal may be appropriate even when a majority of the Interests of Justice factors favor Plaintiff. See Henry, 2014 WL 1224575 at *6-7. However, here, as demonstrated above, the majority of factors favor Defendant and favor this Court retaining jurisdiction. Accordingly the Court should deny Plaintiffs' request to remand based on the Interests of Justice exception.

POINT III

PLAINTIFFS WILL NOT BE ABLE TO PROVE CITIZENSHIP TO DEFEAT CAFA JURISDICTION WITH LIMITED DISCOVERY NOR ARE PLAINTIFFS ENTITLED TO SUCH DISCOVERY

Lastly, Plaintiffs continue to attempt to "cover their bases" by asking this Court for limited discovery on the issue of class citizenship, reasoning that Defendant is in possession of information regarding the putative class members' citizenship at the time this action was filed. This, like much of the arguments set forth by Plaintiffs, is a complete assumption as Defendant has little information, readily available or otherwise, as to the citizenship of the putative class members at the time this matter was filed since Project OHR stopped employing the putative class members nearly a full year before suit was filed, in May 2015 or long before.

The plaintiffs in Abdale v. N. Shore-Long Is. Jewish Health Sys., Inc., 2014 WL 2945741 at *8-10 (E.D.N.Y. June 30, 2014), which Plaintiffs cite in support of their application for limited discovery, were in circumstances easily distinguished from the circumstances here, as those plaintiffs actually provided documentary evidence and conducted interviews of potential class members to garner citizenship information, during the time in which they had to remove. Here, Plaintiffs have conducted no such discovery or due diligence in their time to remand warranting additional time for discovery. ***In fact, Plaintiffs have not even provided the addresses of the named Plaintiffs nor did they provide declarations from them to establish their citizenship***. Plaintiffs are undeserving of limited discovery and granting such an application would only lead to a fishing expedition as the citizenship of the class members at the time this matter was filed cannot be ascertained by either party since Project OHR stopped employing class members in May 2015. Accordingly, Plaintiffs request for limited discovery should be denied.

CONCLUSION

Defendant Project OHR respectfully requests that Plaintiffs' motion for remand be denied in its entirety.

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Dated: June 8, 2016

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